UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 11

Alton H. Piester, LLC Case 11-CA-21531

ANSWERING BRIEF OF COUNSEL FOR ACTING GENERAL COUNSEL

Shannon R. Meares Counsel for Acting General Counsel

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 11

ALTON H. PIESTER, LLC

and Case 11-CA-21531

DARRELL CHAPMAN, an Individual

To the Honorable, Members of the National Labor Relations Board 1099 14th Street, NW Washington, DC 20570-0001

ANSWERING BRIEF ON BEHALF OF COUNSEL FOR ACTING GENERAL COUNSEL¹

This Answering Brief is filed pursuant to Section 102.46(d) of the Board's Rules and Regulations. Respondent has filed Exceptions to the Administrative Law Judge's Decision ("Exceptions") arguing that Administrative Law Judge Mary Miller Cracraft ("Judge") erred in finding Respondent liable for the full amount of backpay set forth in the Compliance Specification.

I. STATEMENT OF THE CASE

On September 30, 2008, the Board found that Respondent terminated Darrell Chapman, on April 2, 2007, because of his protected concerted activities, in violation of Section 8(a)(1) of the Act. *Alton H. Piester, LLC*, 353 NLRB 369, 372 (2008) enfd. 591 F.3d 332 (4th Cir. 2010).

¹ References are as follows: "JD" refers to the Judge's Decision; "L" refers to the line on the page of the Judge's Decision; "BR" refers to Respondent's Memorandum in Support of Employer's Exceptions to the Administrative Law Judge's Decision; "TR" refers to the transcript of the compliance hearing; "GC" refers to Acting General Counsel's Exhibits; and "R" refers to Respondent's Exhibits.

Specifically, the Board concluded that Chapman's individual complaint, on April 2, 2007, regarding the implementation of changes to the fuel surcharge amounted to a continuation of earlier concerted complaints and, therefore, Respondent violated the Act when it terminated Chapman for raising those concerns. *Id.* The Board dismissed Respondent's arguments that it would have terminated Chapman for reasons beyond his April 2 conduct, including two predischarge traffic accidents involving Chapman's work truck. *Id.* at 372-373. The Board ordered that Chapman be reinstated and made whole for any loss of earnings and benefits suffered as a result of the discrimination against him. *Id.* at 374-376.

On August 27, 2010, following the Fourth Circuit Court of Appeals' enforcement of the Board order, the Region issued a Compliance Specification asserting that Chapman is due a total of \$72, 583.47, plus interest, for the backpay period beginning April 2, 2007, and ending June 14, 2010, the date that Respondent's unconditional offer of reinstatement expired. On October 18, 2010, a compliance hearing was conducted and, thereafter, on December 30, 2010, the Judge issued a supplemental decision ordering that Chapman be paid the total amount of backpay pled in the Compliance Specification, with interest. In so finding, the Judge rejected Respondent's argument that it could not reinstate Chapman, as of June 2007, because of his driving record. (JD 4, L 30-35)

On January 13, 2011, Respondent filed Exceptions.² Respondent excepts to the Judge's findings that: (1) Chapman's backpay did not terminate in June 2007; and (2) even if Chapman's backpay terminated in June 2007, he was eligible for reinstatement in November 2007. Counsel for Acting General Counsel submits that Respondent's Exceptions are procedurally defective and, substantively, lack merit. In this regard, Respondent's Exceptions and Memorandum in

² Although Respondent's Exceptions are dated January 13, 2011, Respondent did not certify service of its Exceptions until January 14, 2011.

Support of Exceptions to the Administrative Law Judge's Decision ("Brief") do not comply with Section 102.46(b) and (c) of the Board's Rules and Regulations. Furthermore, Respondent's arguments lack evidentiary support and are irrelevant to the analysis of the issue. As discussed below, the Judge's findings are fully supported both in fact and law and Counsel for Acting General Counsel recommends that the Judge's order be adopted in its entirety.³

II. DISCUSSION

A. Respondent's Exceptions and Brief are procedurally defective and, therefore, should be disregarded in their entirety.

Section 102.46(b)(1)of the Board's Rules and Regulations provides, in pertinent part, that:

Each exception: (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

Section 102.46(b)(2) provides that, "Any exception which fails to comply with the foregoing requirements may be disregarded." In addition, Section 102.46(c)(3) provides that the brief in support of exceptions must similarly make specific page references to the record.

Counsel for Acting General Counsel submits that Respondent's Exceptions and its Brief should be disregarded because they fail to comport with the requirements of Section 102.46(b)(1) and 102.46(c)(3). In this regard, Respondent's Exceptions fail to cite specific portions of the record relied upon as required by Section 102.46(b)(1). Similarly, Respondent's Brief fails to comply with Section 102.46(c)(3) because, not once, does Respondent provide specific page

³ In light of Respondent's Exceptions, Counsel for Acting General Counsel has filed a cross-exception to the Judge's decision regarding her denial of Counsel for Acting General Counsel's Motion in Limine and Motion to Strike Paragraphs 4 and 5 of Respondent's Amended Answer.

citations to the record in support of its arguments. Respondent's Exceptions and Brief are, therefore, defective and, pursuant to Section 102.46(b)(2), they should be disregarded in their entirety, and the Judge's order should be adopted.

B. Respondent's Exceptions substantively lack merit and the Judge's recommended order should be adopted.

Respondent excepts to the Judge's finding that Chapman's backpay did not terminate in June 2007 and that, even if Chapman's backpay terminated in June 2007, he was eligible for reinstatement as early as November 2007. Counsel for Acting General Counsel submits that the Judge, relying on long-established legal principles, properly decided the issue of backpay liability, as Respondent failed to establish that Chapman was unavailable or unfit to work prior to its unconditional offer of reinstatement in June 2010. This section of the brief will address the general legal principles, including the evidentiary burdens, in a compliance proceeding. The brief will then provide a detailed analysis of Respondent's meritless Exceptions.

1. General Legal Principles

A Board order of backpay is "designed to vindicate the policies of the Act by making employees whole for losses suffered on account of unfair labor practices." *Center Construction Co., Inc.*, 355 NLRB No. 198 (2010) slip op. at 3, citing *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). When an employee loses employment based on a violation of the Act, the finding of an unfair labor practice is presumptive proof that backpay is owed to the discriminatee. *Center Construction Co., Inc.*, 355 NLRB No. 198, slip op. at 3; *St. George Warehouse*, 351 NLRB 961, 963 (2007); *Weldun International*, 340 NLRB 666, 671 (2003).

The burdens in a backpay proceeding are clear. Counsel for Acting General Counsel's only burden is to establish the amount of backpay due, that being the amount the employee would have received but for respondent's unlawful conduct. *Center Construction*, 355 NLRB

No. 198, slip op. at 3. Here, the Judge found that Counsel for Acting General Counsel met this burden. ⁴ (JD 3, L 25-26) As Counsel for Acting General Counsel met this burden, the burden then shifted to the Respondent to establish affirmative defenses reducing its liability. *St. George Warehouse*, 351 NLRB at 963. It is critical to note that Respondent's burden is heavy, as any uncertainty regarding the amount of backpay is resolved in favor of Chapman and against the wrongdoer Respondent. *The Lorge School*, 355 NLRB No. 94, slip op. at 5.

2. The Judge correctly found that Respondent failed to meet its burden to demonstrate that Chapman's backpay terminated in June 2007 because of his driving record.

In its Exceptions, Respondent excepts to the Judge's finding that Chapman's backpay did not terminate in June 2007. In support of this exception, Respondent asserts that when owner Alton H. Piester looked into the possibility of reinstating Chapman, to mitigate potential damages stemming from the unfair labor practice charge, he was informed by his insurance carrier, on June 18, 2007, that adding Chapman as a driver would cause an increase or loss in coverage due to Chapman's driving record. (BR 2) Respondent argues that because it has an established past practice of not hiring and/or terminating drivers who adversely affect its insurance coverage, its backpay liability tolled in June 2007. (BR 3-6)

To the contrary, Counsel for Acting General Counsel submits that the Judge correctly found that Chapman was available for work in June 2007 and, therefore, Respondent's liability did not end in June 2007. Respondent's Exceptions lack merit because: (1) Respondent was aware of Chapman's driving record prior to his discharge yet it failed to report the violations to its insurance carrier and, therefore, it cannot now use its intentional deception to toll its backpay

⁴ In its Brief, Respondent affirmatively states that it no longer contests Counsel for Acting General Counsel's method of calculating backpay. (BR 1)

liability; (2) any practice of not hiring employees who would cause increased insurance rates is irrelevant; and (3) Chapman was not unavailable for work as Respondent had the option of hiring Chapman and paying the increased premium, as opposed to refusing to hire him. Below is a detailed analysis of the record evidence undermining Respondent's arguments.

a. Respondent was aware of Chapman's driving record prior to his discharge and cannot now use such information to toll backpay as of June 2007.

The Judge properly found that Respondent was aware of Chapman's driving record prior to his discharge and, therefore, it is precluded from now using his driving record as a basis for limiting its backpay liability when it was willing to allow the violations and accidents to remain unreported prior to his unlawful discharge. (JD 4, L 15-16, 25-35; JD 5, L 28-32) The record is replete with evidence supporting the Judge's finding. In this regard, Respondent presented Cindy Jackson, who is currently employed by Tidwell Insurance Agency (Tidwell) and is the insurance agent responsible for producing, administering and overseeing Respondent's truck insurance policy. (TR 37-38) Jackson testified that Tidwell began providing insurance coverage, through underwriter Southern Risk, to Respondent on or about February 28, 2007. (TR 58) At that time, Respondent completed an application, which required that it provide general information, including a description of its operations, a list of proposed drivers, a list of prior insurance carriers, any losses experienced, and all vehicle information. (TR 59-60; GC 5) Upon completion, Piester signed the application acknowledging that the statements in the application were both true and correct. (GC 5) Directly above his signature, Piester was warned that executing the application with intent to defraud or deceive the insurer by giving false, incomplete or misleading information was criminal. (GC 5)

As of February 28, 2007, the date on which the new insurance policy became effective, Chapman had three speeding violations on his driving record. (GC 3, 5) Tidwell and Southern

Risk were both aware of these violations; nevertheless, Chapman was approved for coverage. (TR 45-46; GC 5) Following Chapman's unlawful termination, Respondent specifically requested that he be removed from the policy. (TR 63; GC 6)

In June 2007, Piester contacted Jackson and inquired about adding Chapman back to the policy. (TR 43) However, Piester informed Jackson, for the first time, that Chapman had been involved in two accidents in company vehicles during the period of January and February 2007, prior to the inception of the Tidwell insurance policy. (TR 46, 67, 100) Piester actually went so far as to provide Jackson with receipts for costs associated with the accidents. (JD 5, L 30-33, TR 65, 99; R 5) Upon receipt, Jackson faxed the newly-provided accident information along with Chapman's driving record to Southern Risk and was subsequently informed that there would either be a 30% increase in Respondent's premium or loss of coverage for Respondent if Chapman were to be added back to the policy. (TR 43, 47, 66-67, 69; GC 7) By letter dated June 18, 2007, Jackson then notified Respondent of the potential consequences for adding Chapman. (R 5) Jackson testified, and the Judge found, that Chapman was the only employee scrutinized at the time; no current employees' driving records were reviewed. (JD 6, L 1-4; TR 69) As the Judge correctly stated, the Respondent failed to present evidence that Chapman's driving record would have been subject to review in June 2007, absent his unlawful termination. (JD 5, L 43; JD 5, L 1-4)

Although the Judge did not specifically discredit Piester, she found that Respondent did not notify the insurance company about Chapman's accidents until it was attempting to mitigate its damages and, it was at that time, that it went to "great lengths" to provide receipts from the pre-discharge accidents. (JD 5, L 26-32) Accordingly, after Chapman filed the underlying charge on April 13, 2007, and approximately ten days before the issuance of the complaint, in anticipation of complaint issuing, Piester contacted Jackson about adding Chapman to the policy

and notified her, for the first time, about Chapman's accidents. *Alton Piester*, 353 NLRB at 378. The record clearly establishes that Piester knowingly provided false information on his application for insurance. He was well aware of Chapman's accidents, as Respondent was billed for the related costs, respectively, in January and February 2007. (GC 7) In fact, on February 19, 2007, Respondent paid \$1500.00 for a towing service related to Chapman's February accident, merely days before Piester signed and executed the application. (GC 7) Yet, Piester failed to list either accident or associated costs on his application for truck insurance. (GC 5) The Judge credited Jackson's testimony that any time money is paid out due to an accident, whether or not the driver is at fault, that accident is chargeable under the insurance policy and can affect coverage. (JD 4, L 38-39; TR 47, 56) Accordingly, the reasonable inference to be drawn from Piester's conduct is that he initially deceived the insurance company to avoid higher insurance premiums. This inference is validated in Respondent's Brief as it admits that Piester initially failed to report Chapman's accidents to avoid increased insurance rates. (BR 7)

Whereas Piester initially sought to limit his insurance costs in February 2007, once it became apparent to him that he may have to reinstate Chapman, in June 2007, his objective changed and he set out to deliberately adversely impact his coverage in order to substantiate his desire not to rehire Chapman. Respondent's belated claim of Chapman's un-insurability is a direct consequence of its discriminatory actions both in discharging Chapman and subsequently notifying the insurance carrier of his pre-discharge accidents. Respondent cannot be allowed to benefit from its calculated deceptive and unlawful conduct.

b. Respondent's practice of not hiring employees who cause an increase in insurance rates is irrelevant.

In its Brief, Respondent argues that the Judge erred in finding it liable for the entire backpay liability period notwithstanding the fact that it established a past practice of not hiring

and/or terminating employees who cause an increase in insurance rates. (BR 3-7) The Judge properly found that Respondent's past hiring practice is irrelevant. (JD 5, L 26). In this regard, Respondent's argument regarding its hiring practices is a red herring because the relevant issue is not whether Respondent consistently applied a practice of not hiring drivers who would cause an increase in coverage; instead, the issue is whether Respondent can definitively establish that Chapman, as a current employee, would have been dropped from insurance coverage in June 2007. As explained above, Respondent acted at its own peril when it unlawfully terminated Chapman and, therefore, whether it had a practice of paying increased premiums/surcharges for new hires is irrelevant, as based on its unlawful conduct it would have to do so here to comply with the Board ordered remedy to reinstate him to his former job without prejudice.

The issue, thus, is not whether Respondent established a particular hiring practice, but, instead, whether Respondent demonstrated that it would have terminated Chapman in June 2007 because of his driving record. Although the Judge found that Respondent established a past practice of not hiring applicants who would cause an increase in its insurance rates, she did not find that Respondent established a past practice of terminating current employees who had driving records that resulted in increased insurance rates. (JD 5, L 1-24) Specifically, the Judge found that, "Had the underlying termination not occurred, Chapman's driving record would not have been subjected to review in June 2007 and he would have remained employed by Piester." (JD 5, L 44; JD 6, L 1-4) Respondent's failure to establish a past practice of terminating current employees is relevant to the analysis, as the Board's make whole remedy requires that Chapman be treated as though he remained employed with Respondent during the backpay period, not that he be treated as a new hire. *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), enfd. in part 231 F.3d 1156 (9th Cir. 2000) citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (holding

that the objective in a compliance proceeding is to restore the status quo by restructuring the circumstances that would have existed absent the unfair labor practice).

The documentary and testimonial evidence do not establish that Respondent has a practice of terminating employees because of increased premiums due to their driving record. In this regard, Respondent attempts to show that existing employees were dropped midemployment based on their driving records. For example, Jackson and Piester testified, and Respondent asserts in its Brief, that existing employee Ronald Hasty was dropped from the insurance policy because of his driving record. (BR 3; TR 49, 79; R 7) However, a review of the payroll records and admitted summaries show that Ronald Hasty was never employed by Respondent during the relevant period. (GC 2; R 1, 2)

Similarly, Respondent argues that it unilaterally terminated the employment of Emanuel Griffin because of his driving record. (BR 3; TR 79-80; R 9) In this regard, Piester testified that once Respondent determined that Griffin had too many speeding tickets, "he had to go." (TR 80) The documentary evidence, however, shows that Piester was forced to terminate Griffin because Deep South notified him that Griffin was going to be immediately excluded from coverage; the decision to terminate Griffin was not unilateral. (R 9) Thus, Griffin's situation is distinguishable from Chapman's as the insurance company terminated Griffin's coverage; Respondent was not given the option to pay a surcharge to continue coverage for Griffin. (R 9) By contrast, Tidwell informed Respondent that it could pay a 30% surcharge to cover Chapman. (TR 69; R 5) Respondent, therefore, failed to establish that Chapman would have been terminated as a current employee.

In its Brief, Respondent argues, for the first time, that it terminated James Siebert due to two accidents and the fact that his driving record became unacceptable to the insurance company. (BR 3) There is no testimonial or documentary evidence in the compliance

proceeding regarding Siebert's termination. Similarly, there is no evidence in the record that Siebert was terminated because he became unacceptable to the insurance company. As Respondent failed to present evidence, during the compliance hearing, regarding the insurability and termination of Siebert, any evidence presented in its Brief should be disregarded. See *Retlaw Broadcasting Co.*, 324 NLRB 1148, 1149 at fn. 1 (1997) (evidence presented by respondent, for the first time, in post-hearing brief is not in the record and should not be considered). Moreover, to the extent that Respondent is arguing that Chapman would have been terminated because of his two pre-discharge accidents, this argument was specifically considered and rejected by the Board in the underlying unfair labor practice. *Alton Piester*, 353 NLRB at 372-373.

Although not discussed in the Judge's decision, during the hearing, Respondent asserted that, based on closer scrutiny from the insurance policy underwriter Southern Risk, it could not reinstate Chapman in June 2007 because it established a new work rule allegedly prohibiting drivers from incurring more than three traffic violations. In this regard, Jackson testified that, not long after the inception of the insurance policy in February 2007, an inspector was sent out to review the drivers' records due to a number of accidents. (TR 46, 52-53) One of the drivers in question was Barry Sease. (R 12) An email dated May 17, 2007, from Southern Risk to Jackson noted a concern with the number of claims so early in the policy, specifically identifying Sease as the culprit in two of the accidents. (R 12) Southern Risk questioned whether the Respondent had formulated a plan to control the number of claims and then directed Respondent to establish a safety policy to address specific safe driving objectives for all employees. (TR 52-54; R12)

At hearing Respondent claimed that it, based on Southern Risk's directive, implemented a new policy on May 21, 2007, which provided that if a driver had three or more violations, he or she would be terminated upon Piester's knowledge of the violations. (TR 71, 92; R 12) The

policy noted that the application of the policy was subject to Piester's discretion. (R 12) Allegedly, all employees were required to sign and date the policy acknowledging its implementation. (TR 71, R 12) Piester forwarded the new policy to Jackson. (TR 54) Jackson's office notified Southern Risk of the new policy, noting that the policy was effective immediately. (TR 71; R 12)

During the hearing, Respondent appeared to argue that this new policy precludes

Chapman from being reinstated. Respondent's argument is not persuasive because the
overwhelming evidence demonstrates that the policy did not go into effect in 2007. In this
regard, although Piester may have drafted the policy and forwarded it to the insurance carrier as
evidence of his compliance with its request, Respondent failed to produce, pursuant to subpoena,
a single employee-signed policy from 2007. (GC 12) All of the signed policies produced by the
Respondent were dated in 2009 or 2010, over 2 years after the policy allegedly went into effect.
(GC 12) When questioned about Respondent's failure to produce copies of the signed policies,
Piester simply stated he was "sorry it didn't please" Counsel for Acting General Counsel that he
did not have employee-signed copies from 2007. (TR 95) As the policy was never implemented
in the second quarter of 2007, Respondent cannot rely on the policy to now argue that
Chapman's backpay should be tolled during that time because he would have been terminated.

Moreover, even if Respondent could demonstrate that it implemented its new safety policy in the second quarter of 2007, the evidence shows that any such policy was not consistently enforced. In this regard, Barry Sease, the very employee who caused the two accidents that prompted the inspection and subsequent new policy, continued to work for Respondent throughout the third and fourth quarter of 2007, and never even signed the policy acknowledging receipt. (TR 98; GC 2) Similarly, Respondent hired employee Dexter Booker on

or around the week of February 20, 2008, even though he had two at-fault accidents on his record from 2005 and 2006. (GC 8)

In short, there is simply no evidence that Respondent would have terminated Chapman, as a current employee, because of the alleged newly implemented safety policy. As noted above, there is no evidence that the Respondent pulled the driving records of all of its current employees, upon implementation of the new safety policy, to determine whether each employee had three or more traffic violations. Similarly, Piester confirmed that no drivers, not even Sease, were terminated pursuant to the implementation of the new policy. (TR 105; GC 2) Moreover, Tidwell was led to believe by Respondent that drivers with three or more violations were "on their last limb, so to speak," not that drivers would be immediately terminated because of their driving record. (R 12) As the policy itself provides for substantial discretion, Respondent has failed to demonstrate that Chapman would have been terminated during the second quarter of 2007 due to a new work rule prohibiting the employment of drivers with more than three traffic violations and, therefore, the Judge's failure to find that Respondent established practice of terminating current drivers based on their driving records is correct.

In its Brief, Respondent cites *First Transit Inc.*, 350 NLRB 825 (2007) and *John Cuneo*, *Inc.*, 298 NLRB 856 (1990), in support of its argument that an established practice of terminating employees for a non-discriminatory reason can justify the tolling of backpay upon discovery of such evidence. (BR 5) Respondent's reliance on this precedent is misplaced for two reasons. First, as discussed in detail above, Respondent has failed to establish a practice of regularly reviewing employees' driving records and then unilaterally terminating employees because of their driving records. However, more importantly, unlike the respondents in the above-cited cases, here, Respondent knew about the alleged misconduct prior to the unlawful discharge. Chapman's alleged misconduct was not discovered for the first time post-discharge. As the

Judge correctly found, Respondent knew about Chapman's driving record, more specifically, his two chargeable accidents, prior to his unlawful termination on April 2, 2007, yet it failed to fully report his record to the insurance company in February 2007. (JD 5, L 14-18) Again, it is critical to note that, in its Brief, Respondent concedes pre-discharge knowledge, admitting that the accidents were not initially reported in order to avoid increased insurance rates. (BR 7) Respondent cannot now claim that misconduct known prior to Chapman's unlawful discharge, tolls its post-discharge backpay liability.

c. Chapman was not unavailable for work during the backpay liability period.

The Judge correctly found that Respondent failed to establish that Chapman was "literally unavailable to work" in June 2007 as the record is devoid of any evidence demonstrating that Chapman was completely uninsurable or unfit to drive. (JD 5, L 32- 43) Accordingly, there is no evidence that Tidwell or Southern Risk absolutely prohibited Respondent from adding Chapman to the policy. Instead, as Jackson testified, Respondent was informed that he could pay a 30% surcharge or else potentially lose insurance coverage. (TR 43, 67, 69; R 5) Although Piester may have preferred not to pay a 30% surcharge, he created that negative consequence by unlawfully terminating Chapman and removing him from the policy. As Jackson testified, it is within the Respondent's sole discretion whether to pay a surcharge to add a driver. (TR 73) There is no evidence that Jackson ever informed Piester that Chapman could not be added to the policy. (JD 5, L 32-34) To the contrary, Respondent only argues that Piester did not want to pay the increased premium. (JD 5, L 42-43)

The bottom line is that Respondent had options. For example, it could have proposed to Jackson that another driver, with a less than desirable driving record, be removed from the policy to reduce the overall rate of coverage, or Respondent could have sought coverage for Chapman

through a different carrier when the surcharge took effect upon renewal. (TR 88) Jackson admits there are several insurance companies that insure the trucking industry. (TR 70) Respondent never asked Jackson to look for another underwriter, and there is no evidence that Respondent itself searched for another insurance carrier/broker. (TR 70) Although Jackson testified that there is an initial 45-day window period during which a new policy cannot be cancelled due to certain state and Federal filings, the policy here was long past that window period, as it took effect February 28, 2007, and Piester's inquiry regarding Chapman occurred 90 days later. (TR 74)

Here, Respondent simply assented to the position of Tidwell and Southern Risk without exploring its options and, therefore, there is no proof that it could not reinstate Chapman because of his driving record. See *Overseas Motors, Inc.*, 277 NLRB 552, 557-558 (1985) (respondent failed to establish that discriminatee was uninsurable because: (1) no evidence that it appealed insurance company's decision to cancel or exclude; and (2) the insurance agent and carrier admitted at hearing that they did not seek nor were they asked to seek coverage through other carriers).

3. The Judge correctly notes, alternatively, that even if Chapman were ineligible for rehire in June 2007, he would not have remained ineligible indefinitely.

Although the Judge found that Chapman was eligible for reinstatement in June 2007, she correctly notes, alternatively, that even if Chapman were ineligible for rehire in June 2007, he would not have remained ineligible indefinitely. (JD 6, L 32-41) Respondent excepts to the Judge's alternate theory, asserting that, because of his traffic violations and accidents, Chapman would not have been eligible for rehire before the unconditional offer of reinstatement. Simply put, Respondent is incorrect.

Although Counsel for Acting General Counsel is not suggesting that apportioning is necessary here, Counsel for Acting General Counsel is in agreement with the Judge that the Board has done so when a discriminatee is ineligible for a set period of time during the backpay liability period. See *Performance Friction Corp.*, 335 NLRB 1117, 1120 (2001) (backpay tolled due to discriminatee's physical inability to perform the necessary job duties); *Sure-Tan, Inc.*, 234 NLRB 1187, 1193 (1978), enfd. in relevant part 672 F.2d 592 (7th Cir. 1982) (backpay tolled during discriminatee's incarceration due to unavailability to work).

Here, as the Judge found, the record evidence demonstrates that violations remain on a driver's record for three years; thus, at some point during the liability period, Chapman's driving record would have improved, thereby reducing the cost of coverage and/or eliminating the surcharge altogether. (JD 4, L 37-44; TR 49-50) In this regard, a review of Chapman's driving record shows that as of November 23, 2007, one of his traffic tickets would have fallen off his record leaving Chapman with two traffic tickets and the two accidents. (GC 3) Respondent contends that Chapman's driving record would have nevertheless precluded it from reinstating Chapman in November 2007 due to his accidents. (BR 7) However, the record shows that despite having two chargeable accidents on his driving record, Respondent hired employee Dexter Booker in or around February 2008. (GC 8) Furthermore, there is no evidence in the record that the insurance company would have continued to apply a surcharge to add Chapman to the insurance policy upon the removal of one of Chapman's traffic violations. As the Judge notes, the record only demonstrates that when there are more than three violations, there is at most, a tendency to increase the insurance rate. (JD 4, L 42-44) The record is devoid of any evidence that the insurance carrier uses a specific formula to determine whether there will be an actual increase in the insurance rate.

Moreover, even if Respondent could demonstrate that Chapman remained ineligible for hire in November 2007, there is no question that he would have been completely eligible for hire as early as June 2, 2009, when all of his traffic violations fell off and he only had two accidents, similar to employee Dexter Booker, and, at the latest, February 2010, when all of his traffic violations and accidents fell off his 3-year record. Thus, Respondent's contention that Chapman was completely ineligible for hire at any time during the period of April 2, 2007, through June 14, 2010, is erroneous.

III. CONCLUSION

For the reasons asserted above, Counsel for Acting General Counsel submits that the Judge's recommendation that Chapman be awarded \$72, 538.47, plus interest, should be adopted.

Dated at Winston-Salem, North Carolina, on the 27th day of January 2011.

Respectfully submitted,

Shannon R. Meares

Counsel for Acting General Counsel

National Labor Relations Board

Region 11

4035 University Parkway, Suite 200

P. O. Box 11467

Winston-Salem, North Carolina 27116-1467

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief have this date been served by

Electronic Mail upon the following parties:

Mr. Charles F. Thompson, Jr., Esq. Malone, Thompson, Summers & Ott 339 Heyward Street, Suite 200 Columbia, SC 29201 thompson@mtsolawfirm.com

Overnight mail:

Mr. Darrell Chapman 119 Doe Road Newberry, SC 29108

Dated at Winston-Salem, North Carolina, on the 27th day of January 2011.

Shannon R. Meares

Counsel for Acting General Counsel